Supreme Court, U.S.
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# 87-151

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES A. YATES
AVIATION ORDNANCEMAN THIRD CLASS, U.S. NAVY
*Petitioner,*

v.

UNITED STATES OF AMERICA
*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Military Appeals

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## QUESTION PRESENTED

WHETHER a specific finding by the trial judge that there was not the slightest indication or proof that an accused was the source of gonorrhea renders a confession to illegal sexual acts with a minor child uncorroborated when the only creditable independent evidence that a crime may have been committed was that the minor child contracted gonorrhea.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Charles A. Yates, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Military Appeals entered in this proceeding.

### OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 24 M.J. 114 (CMA 1987) (Appendix A). The opinion of the Navy-Marine Corps Court of Military Review is reported at 23 M.J. 575 (NMCMR 1986) (Appendix B).

### JURISDICTION

The judgement of the Court of Military Appeals was entered on May 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp III 1985).

### STATUTORY AND OTHER PROVISIONS INVOLVED

Article 36, Uniform Code of Military Justice (UCMJ)[1] provides:

> **Article 36. President may prescribe rules**
>
> (a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising

[1] 10 U.S.C. § 836

under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Rule 304(g) of the Military Rules of Evidence[2] provides:

**Rule 304. Confessions and admissions**

(g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that cor[r]oborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be con-

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[2]Part III, Manual for Courts-Martial, United States, 1984.

sidered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

## STATEMENT OF THE CASE

Petitioner is charged with one specification each of rape and of carnal knowledge under Article 120,

UCMJ,[3] and one specification of sodomy under Article 125, UCMJ.[4] The alleged victim is petitioner's daughter who was an infant of two to two and one-half years old on the dates the alleged offenses occurred.

At the pretrial hearing pursuant to Article 39(a), UCMJ,[5] petitioner moved to suppress a confession obtained on November 21, 1985 on grounds that (1) the confession was obtained under duress and (2) the confession was not corroborated by independent evidence. The trial judge ruled that the confession was voluntarily given (R. 161) but decided to suppress the confession on the specific ground that the extrinsic evidence failed to identify the accused as the perpetrator of the gonorrhea. That the child victim had gonorrhea was the only creditable independent proof of the charges and specifications before the court. (R. 163-164). On government appeal pursuant to Article 62, UCMJ,[6] the Navy-Marine Corps Court of Military Review reversed the ruling of the trial judge, concluding that the trial judge erred as a matter of law in suppressing the confession of petitioner. *United States v. Yates*, 23 M.J. 575 (NMCMR 1986) (Appendix B). The United States Court of Military Appeals on petition for review affirmed the decision of the Navy-Marine Corps Court of Military Review. *United States v. Yates*, 24 M.J. 114 (CMA 1987) (Appendix A).

On August 9, 1985, petitioner's daughter, Carolyn Yates, then two and one-half years old, was examined

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[3] 10 U.S.C. § 920

[4] 10 U.S.C. § 925

[5] 10 U.S.C. § 839(a)

[6] 10 U.S.C. § 862

by Dr. McCaffrey of the U.S. Naval Hospital in Okinawa for abnormal vaginal discharge. [(Deposition of Dr. McCaffrey[7] at 3), (A.E. II)]. The examination confirmed by laboratory test results revealed that Carolyn Yates had vaginal gonorrhea. [(Deposition of Dr. McCaffrey at 4), (A.E. II and III)]. The examination also revealed a small tear in the labia of Carolyn Yates but there was no indication whatsoever that the vagina was penetrated. [(Deposition of Dr. McCaffrey at 6, 12), (A.E. II)].

On or about August 11, 1985, petitioner and his wife were tested for gonorrhea in an effort to determine the cause of Carolyn Yates' gonorrhea. (Deposition of Dr. McCaffrey at 4). The test results of both parents revealed neither had gonorrhea. [(Deposition of Dr. McCaffrey at 5), (R. 72, 113-114)]. A social worker using anatomically correct dolls interviewed Carolyn Yates on August 12, 1985. This interview failed to establish that any type of sexual offense was perpetrated upon Carolyn Yates. (R. 21).

On November 21, 1985, petitioner was interrogated by a special agent of the Naval Investigative Service (NIS) concerning suspicions of child molestation, child abuse and child neglect. [(R. 36-37), (P.E. 3)]. This interrogation was preceded by a series of events highly disconcerting to petitioner. On November 8, 1985, all of petitioner's four children were taken into protective custody. (R. 49-50). On November 12, 1985, petitioner's wife was admitted as an in-patient in the

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[7]This deposition is referred to in the record of trial at page 10 as part of Appellate Exhibit VI. It was not attached to Appellate Exhibit VI but was subsequently attached to the record of trial by motion of the government and was part of the appellate record before the Navy-Marine Corps Court of Military Review.

Camp Lester Hospital. (R. 50). On November 13, 1985, the Chief of Staff Officer ordered petitioner to cooperate in the placement of petitioner's children into foster homes. (R. 50-51). On November 20, 1985, petitioner's wife was interrogated by an agent of the Naval Investigative Service on suspicions of child neglect and child abuse. (R. 50). Petitioner's wife told petitioner of the interrogation and her concern about the possibility of prison and separation from her children. (R. 50). Prior to his interrogation, and in compliance with the directive to cooperate with the placement of his children into foster homes, petitioner executed a power of attorney granting a Commander Kilgore authority to transport the children from Okinawa to Alameda County, California. (R. 52). The three-hour interrogation of petitioner led to a written statement prepared by the NIS agent and the statement was sworn to by petitioner. (P.E. 3). A supplement to the statement reporting additional admissions inadvertently left out in Prosecution Exhibit 3 was subsequently prepared by this NIS agent and attested to by him. (P.E. 4).

Petitioner's confession on November 21, 1985, as recorded in Prosecution Exhibits 3 and 4 admits (1) to masturbating on Carolyn Yates' stomach on two occasions, (2) to noticing that petitioner's erect penis was touching the entrance of the child's vagina, although there was no intent by petitioner to penetrate the vagina, and (3) to performing oral sex upon the child on two occasions occurring at some undetermined time after the child's arrival in Okinawa in 1984. (P.E. 3 and 4). Petitioner recanted these confessions under oath in open court at the pretrial hearing claiming that the causes for his untruthful confession

to the NIS special agent were emotional distress, confusion and the desire to protect his wife and preserve his family. (R. 51-66).

The government presented expert testimony to support its theory that Carolyn Yates' gonorrhea was the result of illegal sexual contact. A urologist testifying as an expert for the government on venereal disease testified that 99% of reported cases of gonorrhea were sexually transmitted (R. 74); that there is probably a 10% to 20% chance that someone with oral gonorrhea can transmit the disease to the vagina although he was unaware of any specific studies done to document this mode of transmission (R. 75); and that the presence of gonorrhea infection does not allow one to conclude to any degree of medical certainty that there was penetration of the vagina or sodomy. (R. 81).

Petitioner in his confession also admitted to having had sex with a Filipino bar girl in Subic Bay, Republic of the Philippines, on or about the middle of July 1985. (P.E. 3). Petitioner recanted this admission. (R. 61-62). An investigation conducted by the Naval Investigative Service regarding this admission and checks of clinics and dispensaries in the Philippines and Okinawa failed to yield evidence corroborating this admission or find evidence that petitioner had sought treatment for gonorrhea or other venereal disease. (R. 45).

Both petitioner and his wife testified that they had normal sexual relations after petitioner's trip to the Philippines in July 1985. (R. 59, 114). Petitioner and his wife claim no knowledge of ever having gonorrhea and both tested negative for gonorrhea on tests per-

formed on or about August 11, 1985. [(R. 59, 114), (P.E. 3), (Deposition of Dr. McCaffrey at 5)].

In ruling to suppress the confession, the trial judge specifically found that the only creditable independent evidence before the court were lab results indicating Carolyn Yates had gonorrhea (R. 163); that there was no independent evidence that petitioner had or ever had gonorrhea, all evidence offered being to the contrary (R. 161, 162); that there was not the slightest indication or proof before the court that the accused was the source of Carolyn Yates' gonorrhea (R. 163); that there was no evidence of penetration of the vagina (R. 162); that the likelihood of the tear in the labia to have been caused by a penis was remote, although possible (R. 162); that there was no direct independent evidence that Carolyn Yates' vagina was penetrated or the mouth placed on her genitalia or that semen was deposited on her body (R. 162).

## REASONS FOR GRANTING THE WRIT

This case raises a significant and disturbing issue of criminal law as applied by the military courts that should be settled by this Court. This issue is whether the general rule that the independent evidence necessary to corroborate a confession need not identify the perpetrator for crimes of a "tangible" *corpus delicti* should be applicable to a situation were the independent evidence tends to exonerate the accused from the alleged criminal activity. The corroboration rule as applied in military practice has been codified under Military Rules of Evidence (MRE) 304(g). The Military Rules of Evidence are rules prescribed by the President pursuant to Article 36, UCMJ.[8] The

[8] 10 U.S.C. § 836

history of MRE 304(g) shows that the intention of its drafters was to adopt the rule of corroboration set forth in *Opper v. United States,* 348 U.S. 84, 75 S. Ct. 158, 99 L.Ed. 101 (1954) and *Smith v. United States,* 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954). *See United States v. Yates,* 24 M.J. 114, 116 (CMA 1987) (Appendix A). MRE 304(g)(2), in addition, elevates the rule of corroboration to a formal rule of evidence with the trial judge (military judge) exercising sole responsibility to determine the adequacy of corroborative evidence supporting the admission of a confession for consideration on the merits.

The *Smith* decision classified crimes as a dichotomy, i.e., crimes with a "tangible" *corpus delicti* and crimes with no "tangible" *corpus delicti.* In crimes with no "tangible" *corpus delicti* such as tax evasion, this Court held that the corroborative evidence must implicate the accused in order to show that a crime has been committed. This dichotomy was discussed in *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where in footnote 15 this Court stated:

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim. *See* 7 Wigmore, Evidence (3d ed. 1940), § 2072, n. 5. There need in such a case be no link, outside the confession, between the injury and the accused who

> admits having inflicted it. But where the crime involves no tangible *corpus delicti,* we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed." 348 US, at 154.

The United States Court of Military Appeals in this case has relied upon this dichotomy in holding that the rule of corroboration did not require the government to provide extrinsic evidence that identified the accused as the perpetrator of the alleged offense which, ostensibly, involved a "tangible" *corpus delicti. Yates, supra,* 24 M.J. at 116. Thus, the court held that suppression of petitioner's confession by the trial judge was erroneous as a matter of law because the judge grounded his ruling on evidence that the victim's gonorrhea, the only creditable extrinsic evidence to support an injury of criminal agency, was not proven to have been caused by the accused. Petitioner submits that this holding creates substantial confusion and potential injustice by failing to recognize as a necessary factor in corroboration the consistency of essential facts admitted to in the confession with the extrinsic evidence that surrounds or supports the occurrence of the criminal act. The Army Court of Military Review in *United States v. Loewen,* 14 M.J. 784 (ACMR 1982), recognized this necessity for consistency when it held that a confession to forgery was not corroborated where the government's independent evidence tended to exonerate the accused as being the forger of the alleged forgeries. This necessity of consistency is also reflected in the language of MRE 304(g), requiring for corroboration "independent evidence which is sufficient to justify an inference that

the facts admitted by the accused are true." Absent this necessity for consistency, it would be theoretically possible to corroborate a confession to a strangulation murder by producing a dead body evidencing death by gunshot wounds and no evidence of strangulation.

Petitioner, as a matter of statutory right under Article 16, UCMJ,[9] had elected trial before a panel of officers. (R. 6). This panel is the military equivalent of a jury of peers. Thus, the considerations recognized by this Court which justify a restriction on the power of the jury to convict on the basis of uncorroborated confessions clearly apply in this case. These considerations were summarized by this Court as follows:

> Its purpose is to prevent "errors in convictions based upon untrue confessions alone" . . . its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, . . . further caution is warranted because the accused may be unable to establish the involuntary nature of this statements. Moreover, though a statement not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain

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[9] 10 U.S.C. § 816

> and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made, Note, 28 Ind. L.J. 374.

*Smith, supra,* 348 U.S. at 153, 75 S.Ct. at 197. The circumstances surrounding the extraction of petitioner's confession give rise to concerns outlined above. Although the voluntariness of petitioner's confession is not at issue,[10] the circumstances surrounding the extraction of the confession can only cast doubt on the reliability of the confession. Petitioner was under severe stress due to the disintegration of his family. Within two weeks preceding his confession, petitioner lost custody of his children (R. 49-50); petitioner's wife was hospitalized (R. 50); she was distressed by having been suspected of child abuse and child molestation, and the prospects of prison and separation from her children were emotionally devastating. (R. 50). Petitioner was also under interrogation for approximately three hours. It is recognized that

> [e]ven mere fatigue, the loosening of the mental firmness and the intrusion of the suggestion of guilt from long periods of questioning might lead to such false confession.

Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession,* 103 U. Pa. L. Rev. 638, 645 (1955).

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[10]For difficulties in proving involuntariness of confessions where a suspect is one on one with the police, *see* 43 Harv. L. Rev. 617 (1930).

The charges against petitioner are heinous offenses describing rape, carnal knowledge and sodomy of a minor child. The capacity of these offenses to inflame passions in average individuals and jurors should not be underestimated. In trials involving accusations of sexual molestation of minor children, there is a strong tendency for human passions to give way to reason and to presume guilt of an accused, placing the burden to prove innocence on the defendant. This burden to prove innocence becomes insurmountable when a confession by the accused, no matter how obtained, becomes a part of the evidence. Unless the confession is corroborated by independent evidence supporting its reliability and independent evidence proves that the alleged offenses did take place, submission of the confession to a jury carries a very high risk of wrongful conviction for imagined offenses. In instances of this nature, the required corroboration must go beyond mere proof of the *corpus delicti;* it must prove the confession reliable or identify the accused as the perpetrator.

## CONCLUSION

The Court of Military Appeals misapplied the rule of corroboration as espoused in *Opper* and *Smith* and as mandated by MRE 304(g). It blindly applied the general proposition that the independent evidence need not identify the accused as the perpetrator to allow admission of a confession where the independent evidence tended to exonerate the accused as the perpetrator and rendered the confession unreliable.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**U.S. Court of Military Appeals**

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**55,977.**
**UNITED STATES,**

*Appellee*

v.

Charles A. YATES, Aviation Ordinanceman Third Class, U.S. Navy,

*Appellant.*

NMCM Misc. Dkt. No. 86-05.

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May 26, 1987.

Accused, aviation ordinanceman third class (E-4), United states Navy, was charged with rape, carnal knowledge, sodomy, and indecent acts with a child. Upon timely motion by trial defense counsel, the military judge suppressed the accused's confession. Government appealed. The United States Navy-Marine Corps Court of Military Review, 23 M.J. 575, reversed and remanded. Review was granted. The United States Court of Military Appeals, Cox, J., held that the Government was not required to corroborate the identity of the accused as the perpetator in order for the accused's out-of-court admissions to be admissible.

Affirmed.

Everett, C.J., concurred in part and dissented in part with opinion.

**Opinion of the Court**

COX, Judge:

The accused was charged with rape, carnal knowledge, sodomy, and indecent acts with a child, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934, respectively. Prior to pleas, the defense moved to suppress the accused's confession for lack of corroboration.[1] After taking evidence and hearing argument on the matter, the military judge granted the motion to suppress, finding that the confession was uncorroborated. Whereupon, the Government appealed pursuant to Article 62, UCMJ, 10 U.S.C. § 862. The Court of Military Review reversed the decision of the military judge. 23 M.J. 575 (N.M.C.M.R.1986). We granted the petition to review the following issue:

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT CONCLUDED THAT THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN SUPPRESSING APPELLANT'S CONFESSION.

On August 9, 1985, the accused's wife took their 2-year-old daughter for a medical examination because the child had a vaginal discharge. After tests, the child was diagnosed as having gonorrhea. The accused and his wife were then tested and the results for both were negative for gonorrhea. When interviewed by the Naval Investigative Service, the accused admitted having sexual contact with the child, although he denied that he had ever contracted gonorrhea himself. He stated that he had sexual relations with a bar girl in the Republic of the Philippines in mid-July 1985 and had sexual contact with the child upon his return. Medical evidence established that gonorrhea is transmitted by sexual contact in 99 percent of the cases reported. Further, there was a five-to-ten percent probability of a false-negative on gonorrhea tests administered

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[1]For a scholarly discussion of the corroboration rules, *see* Cutts, *Corroboration of Confessions: The Opper Rule*, 13 AF JAG L.Rev. 50 (Winter 1971).

to the accused and his wife. Other medical testimony indicated that the standard medication used in treating gonorrhea can be purchased over the counter in some countries and "can effect a cure within 24 hours."

The military judge found that the accused's admissions were not sufficiently corroborated as there was "no evidence independently identifying the accused as the perpetrator." After a detailed discussion of the law and the facts of the case, the Court of Military Review held "that the trial judge erred as a matter of law in requiring the Government to prove through independent evidence alone the identity of the accused as the perpetrator of the offenses." 23 M.J. at 579. We agree.

It is widely accepted that a conviction cannot be based solely on an uncorroborated, out-of-court admission or confession of the accused. *See generally McCormick on Evidence* § 145 (E. Cleary 3d ed. 1984); 7 Wigmore, *Evidence* §§ 2070–2074 (Chadbourn rev. 1978). The rationale behind this requirement was explained by the Supreme Court in *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954):

> It purpose is to prevent "errors in convictions based upon untrue confessions alone," *Warszower v. United States, supra*, [312 U.S. 342] at 347 [61 S.Ct. 603, 606, 85 L.Ed. 876 (1941)]; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, *Bram v. United states, supra* [168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897)]; *Wilson v. United States, supra* [162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090 (1896)], further caution is warranted because the accused may be unable to establish

> the involuntary nature of his statements. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made, Note, 28 Ind.L.J. 374. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror. Nevertheless, because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the dangers which gave rise to them.

348 U.S. at 153, 75 S.Ct. at 197.

In *Opper v. United states,* 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), the Supreme Court rejected the proposition that the corroborative evidence must "establish the whole of the *corpus delicti.*" Rather, "[i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." 348 U.S. at 93, 75 S.Ct. at 164. In *Smith v. United States, supra,* the offense was tax evasion, which the Court described as resulting in "no tangible injury which can be isolated as a *corpus delicti.*" It was reasoned, therefore, that as to such a crime, "it cannot be shown that the crime has been committed without identifying the accused." 348 U.S. at 154, 75 S.Ct. at 198.

Applying *Opper* and *Smith* in *Wong Sun v. United states,* 371 U.S. 471, 489-90 n. 15, 83 S.Ct. 407, 418 n. 15, 9 L.Ed.2d 441 (1963), the Supreme Court stated as follows:

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), § 2072, n. 5. There need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible *corpus delicti*, we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed." 348 U.S., at 154, 75 S.Ct. at 198.

Thus, the *Opper-Smith* rule does not require independent evidence identifying the accused as the perpetrator in every case. *See United States v. Johnson*, 589 F.2d 716 (D.C.Cir.1978); *United States v. Vega-Limon*, 548 F.2d 1390 (9th Cir. 1977). In paragraph 140*a*(5), Manual for Courts-Martial, United States, 1969 (Revised edition), the President adopted the corroboration rule as set forth by the Supreme Court in *Opper* and *Smith*. *See* D.A.Pam. 27-2, Analysis of Contents, Manual for Courts-Martial, United states, 1969, Revised Edition, p. 27-9 (1970). Mil.R.Evid. 304(g) tracks the language of paragraph 140*a*(5) and merely "restates the present law of corroboration with one major procedural change." App. 22, Analysis, Manual for Courts-Martial, United States, 1984, at A22-12. It provides:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

The "major procedural change" is contained in Mil.R.Evid. 304(g)(2), which provides that it is the sole responsibility of the military judge to "determine when adequate evidence of corroboration has been received." Mil.R.Evid. 304(g)(1) states that the quantum of corroborating evidence required is that sufficient "to raise only an inference of the truth of the essential facts admitted."

In a case such as this, where the crime is one involving physical injury to a person, *Wong Sun* says it is sufficient under the *Opper-Smith* approach if the independent evidence establishes "that the injury for which the accused confesses responsibility did-in-fact occur, and that some person was criminally culpable." 371 U.S. at 489 n. 15, 83 S.Ct. at 418 n. 15. Because the military judge stated on the record that the Government was required to corroborate the identity of the accused as the perpetrator, he was apparently acting under a misapprehension of the applicable law when he made his ruling on the suppression motion. The Court of Military Review specifically refused to express a "view as to whether the independent evidence sufficiently corroborates the accused's confession." 23 M.J. at 579. Thus, at trial, it is for the military judge to determine whether the corroborating evidence is sufficient to "raise an inference of the truth of the essential facts admitted." Mil.R.Evid. 304(g)(1).[2] Quite aside from corro-

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[2]Although the military judge found independent evidence of sexual contact, he went on to find, unnecessarily, that there was no independent evidence that the accused was the perpetrator of that sexual contact. He stated, in part:

> In Prosecution Exhibits 3 and 4, the accused described acts that gave rise to the charges and specifications before the court. Specifically, either penetrate or place penis at the opening of [the victim]'s vagina, which addresses the rape, or the lesser included offense of attempt in Charge I and the two specifications thereunder; that he did commit sodomy on [the victim]; and that he did ejaculate by masturbation of semen onto the body of [the victim] sometime after the middle of July—approximately one week

boration considerations, of course, it is for the triers of fact to determine whether the evidence as a whole is sufficient to establish all elements of the offenses beyond a reasonable doubt.

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after the middle of July 1985.

* * * * * *

[I]ndependent evidence reasonably establishes sexual contact; either placing the penis against, mouth against, or semen onto the vagina of [the victim]. She did have gonorrhea on 9 August 1985. And, contacting gonorrhea is caused in 99% of the cases by sexual contact, such as placing the mouth onto, the penis against, or semen onto the vagina. The accused, in his confession, stated that he did each of these acts; that he did place his penis against the vagina of [the victim]; his mouth onto the vagina of [the victim]; and he did ejaculate semen on the body of [the victim].

* * * * * *

Considering the "slight" quantum of evidence required under Mil.R.Evid. 304(g), Judge Sullivan and I, unlike Chief Judge Everett, would be inclined to admit the accused's confessions. *See S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual* 139 (2d ed. 1986). However, that issue does not require resolution by this Court, as the Court of Military Review left that determination to the military judge. *See United States v. Tucker*, 20 M.J. 52, 53 (C.M.A.1985) ("Congress expressly intended for the amended Article 62 of the Code to be construed to permit either party to appeal an adverse ruling from a Court of Military Review to this Court.")

Moreover, it is dangerously speculative to get into the ultimate issue on the record before us. As noted by Chief Judge Everett (at 117 n. 1), the record does not, as it should, contain a copy of the charge sheet. However, Chief Judge Everett indicates that the indecent-acts offense "is based on the admissions in appellant's supplemental confession," *id.* at 118, which recites two acts of oral sex with the victim. My reading of the record indicates that the indecent acts offense was likely based on admissions in appellant's original statement, wherein the accused admitted that he ejaculated on the child's stomach.

In any event, the supplemental confession states that the accused.

admitted that on two prior occasions he has performed oral sex on [the victim]. Yates was unable to tell reporting agent exactly when these acts occurred, but stated they have occurred since [the

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge SULLIVAN concurs.

EVERETT, Chief Judge (concurring in part and dissenting in part):

Appellant was charged with rape and carnal knowledge of his 2-year-old daughter; sodomy with her; and indecent acts with her, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934, respectively.[1] The Government's evidence, independent of the confession, established that in the summer of 1985 the victim had gonorrhea, which in almost every instance is transferred by sexual contact. However, according to the medical evidence, the presence of gonorrhea does not prove "with any degree of medical certainty that there was penetration" or "that there was sodomy . . . [o]r oral sex." In light of this undisputed medical evidence provided by the Government's expert witness, I conclude that, although the military judge erred in the standard of corroboration that he applied, he reached a result that in many respects was correct.

As the majority opinion observes, the Manual for Courts-Martial should not be construed to require independent

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victim] was two years old, and subsequent to her arrival on Okinawa in 1984.

The record reflects that the child was 2-1/2 years old at the time she was diagnosed as having gonorrhea in August of 1985. As the accused admitted that the acts of oral sodomy occurred when the child was 2 years old, it is difficult to follow Chief Judge Everett's reasoning that the acts of oral sodomy were insufficiently corroborated because they occurred "substantially before the discovery in mid-July 1985 that Yates' daughter had gonorrhea." *Id.* at 118. A reasonable inference to be drawn from the evidence is that the acts of oral sodomy took place close in time to the discovery of the gonorrhea, a date *since* the child was 2 years of age and *subsequent* to her arrival in Okinawa.

[1]The charge sheet is not in the record of trial at its appropriate place; but the nature of the charges was stated by trial counsel. (R. 2).

evidence of the identity of the person who committed a crime.[2] At 116. The 1951 Manual made clear that such corroboration was unnecessary. Para. 140*a*, Manual for Courts-Martial, United States, 1951, p. 252. In all subsequent Manuals the intent was to liberalize, rather than to tighten, the requirements of corroboration. DA Pam. 27–2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition), para. 140*a* (5); App. 18, Analysis of Military Rule of Evidence 304(g), Manual, *supra;* App. 22, Analysis of the 1980 Amendments, Mil.R. Evid. 304(g), Manual for Courts-Martial, United States, 1984. The evidentiary defect in this case is that the confession and the evidence do not dovetail in the way required by Mil.R.Evid. 304(g), as well as by the 1951 and 1969 Manuals for Courts-Martial.

On November 21, 1985, Yates was interviewed by Special Agent David C. DePriest of the Naval Investigative Service (NIS) concerning child molestation, child abuse, and neglect. In a sworn statement he admitted "that I could of possibly passed" gonorrhea to his daughter "through accidental sexual contact." He explained that in mid-July 1985, he had attended a Navy school in the Philippines, where he "had sexual intercourse" and "oral sex" with a "bar girl." The next week he had returned home to Okinawa, where subsequently he was examined at a naval hospital at Mr. DePriest's request. In the interval, on two occasions he had "masturbate[d] on . . . [his daughter's] stomach," after which he "would wipe the semen off her stomach." He did "not remember [sic] if any semen got into her vagina." Yates stated that he "did not intentional[ly] try to insert . . . [his] penis into" his daughter's "vagina" and he "did not climax." However, he

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[2]I must admit that the language of the current Manual provision, Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, is ambiguous enough to allow the interpretation adopted by the military judge.

"notice[d] my penis touched the entrance to her vagina." According to Yates' confession, "[a]s far as I know I did not penitrate [sic] [his daughter's] vagina, but was conscious of what was happening." Later in the statement he commented, "Regarding the issue of gonorrhea, I still do not know how . . . [his daughter] came down with the disease. I have never had gonorrhea, even though I have had two extramartial [sic] relationships in the past."

Yates executed a supplemental statement later that same day. There "he admitted that on two prior occasions he has performed oral sex on" his daughter. He could not tell "exactly when these acts occurred"; but they had "occurred since [his daughter] was 2 years old, and subsequent to her arrival on Okinawa in 1984."

According to the medical evidence, Yates and his wife had been tested for the presence of gonorrhea after their daughter had been discovered to have this disease. The tests of the parents were negative. Special Agent DePriest testified that he had checked military dispensaries and clinics on Okinawa to determine if Yates had been treated for gonorrhea and had received a negative response.

Apparently the charge of indecent acts under Article 134 is based on the admissions in appellant's supplemental confession. From my reading of this confession, it appears to refer to events substantially before the discovery in mid-July 1985 that Yates' daughter had gonorrhea. From the medical evidence it seems clear that the onslaught of the gonorrhea was closely related in time to whatever sexual contacts caused the disease.

If a suspect confesses to crimes A and B, which occur at different times, and there is independent evidence as to crime A, the combination of that evidence and the confession to crime A does not provide adequate corroboration of crime B. *See United States v. Afflick*, 18 U.S.C.M.A. 462, 40 C.M.R. 174 (1969). Under these circumstances, the portion of the confession that concerns

crime B is inadmissible for lack of corroboration.[3] Indeed, Mil.R.Evid. 304(g) specifically directs: "If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused *only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.*" (Emphasis added.) Because I discern no independent evidence which corroborates the supplemental confession, I conclude that it cannot be considered to establish the two acts of oral sex on which the charge of indecent acts was based. Thus, there remains no evidence as to that Charge, and it should be dismissed.

With respect to the charge of sodomy, the supplemental statement is also inadmissible. The lapse of time between the earlier acts of "oral sex" and the occurrence of the gonorrhea prevents the presence of the disease from constituting independent evidence that would allow use of these admissions to prove sodomy. Of course, the supplemental confession has no relevance to the rape charge. Thus, if the medical evidence does not provide the corroboration that would permit its use to prove the charge of indecent acts or sodomy, there is no corroboration that would permit its use as proof that a rape occurred. Accordingly, I conclude that the trial judge acted correctly in suppressing the supplemental statement.

The initial confession did not admit to any acts of oral sex or any other acts that would constitute sodomy. Thus, as to the sodomy charge, a factfinder could consider only the evidence that Carolyn had contracted gonorrhea and that the disease may have been caused by sodomy. However, according to the undisputed medical testimony, the

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[3]Perhaps under some circumstances Mil.R. Evid. 404(b) would provide a rationale for allowing commission of crime A to be considered as corroboration of the confession to crime B; but I do not perceive an adequate basis for using such a rationale in the present case.

presence of gonorrhea does not of itself prove "with any degree of medical certainty . . . that there was" "sodomy," "oral sex," or "penetration." Thus, as to the sodomy charge against Yates, the real issue is not so much admissibility of appellant's initial confession as the sufficiency of the Government's evidence when considered in the aggregate. In my view, unless the Government can produce additional evidence, the sodomy charge falls because of insufficient proof.

With respect to the Article 120 violations—rape and carnal knowledge[4]—it would seem that the medical evidence establishes a possibility that penetration of the vagina occurred, as would be requisite for either offense. Under one reading, the initial confession may be construed to contain an admission of penetration or attempted penetration. However, it appears to me that, when read as a whole, the confession admits no more than an indecent assault or indecent acts with a minor. The problem is that, although the independent evidence corroborates the occurrence of some sort of prohibited sexual contact between appellant and his daughter, it does not make clear what type of contact it was.

If the initial confession had contained a clear admission of either rape or sodomy, I believe the corroboration would be adequate. However, as I understand the requirement imposed by Mil.R.Evid. 304(g), the independent evidence, taken along with the confession, must be sufficient to persuade a reasonable factfinder that the accused is guilty. Here, with respect to the charge of rape, the independent evidence against Yates, considered along with his confession, seems inadequate to prove that appellant raped his daughter. Thus, the basic requirement set forth in *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101

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[4]Since a 2-year-old child cannot consent to sexual intercourse, the coexistence of the carnal knowledge charge with the rape charge would appear to be over-charging.

(1954), to which the majority opinion refers, has not been met.

However, the initial confession by Yates clearly encompasses an indecent assault on his daughter and indecent acts with her. These are lesser-included offenses of the rape and sodomy charges. Thus, the confession was admissible for purposes of establishing appellant's guilt of these included offenses.

Accordingly, I would remand this case to the military judge with directions that he suppress entirely the supplemental confession and that he allow the initial confession to be used, along with the independent evidence, to establish that in July 1985 appellant committed the lesser-included offenses of indecent assault on his daughter or indecent acts with her.

## APPENDIX B

**U.S. Navy-Marine Corps Court of Military Review.**

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**Misc. Dkt. No. 86-05.**

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UNITED STATES,

*Appellant,*

v.

Charles A. YATES 401 88 9171 Aviation Ordnanceman Third Class (E-4) U.S. Navy,

*Appellee.*

Decided 8 Aug. 1986.

Accused, aviation ordnance man third class (E-4,) United States Navy, was charged at general court-martial with separate specifications of rape and carnal knowledge and a single specification of sodomy with a child under 16 years of age. Upon timely motion by trial defense counsel, the military judge suppressed evidence of the accused's confession. Government appealed. The United States Navy-Marine Corps Court of Military Review, Grant, J., held that the Government was not required to prove through independent evidence alone the identity of the accused as the perpetrator of the offenses, where the independent evidence, if believed, established the identity of the accused as the perpetrator of the offense through and by dovetailing with the confession, even though the evidence did not itself prove that the accused committed the offenses.

Reversed and remanded.

GRANT, Judge:

The accused was charged at a general court-martial with separate specifications of rape and carnal knowledge and

a single specification of sodomy with a child under 16 years of age in violation of, respectively, Articles 120 and 125, Uniform Code of Military Justice (UCMJ). Upon timely motion by trial defense counsel, the trial judge suppressed evidence of the accused's confession admitting to all the elements of the crimes alleged, on grounds that evidence of the identity of the accused as the perpetrator of the crimes was not established by independent evidence aliunde the confession. The government appealed under Article 62, UCMJ, assigning as error:

**THE MILITARY JUDGE WAS INCORRECT IN HOLDING THAT M.R.E. 304(G) REQUIRED THAT THE IDENTITY OF THE ACCUSED AS THE PERPETRATOR OF THE CHARGED OFFENSES BE PROVEN BY EXTRINSIC EVIDENCE IN ORDER TO SUFFICIENTLY CORROBORATE ACCUSED'S CONFESSION IN THIS CASE.**

I

The accused confessed to Naval Investigative Service (NIS) agents on 21 November 1985, at which time he admitted being sexually intimate, both conventionally and orally, with an unknown bar girl in the Philippines during the middle of July 1985 when he was on temporary additional duty (TAD). He further admitted that upon his return to Okinawa, he may have accidentally transmitted gonorrhea to his infant stepdaughter, Carolyn, as he twice masturbated on her stomach and touched her vaginal opening with his erect penis while she was lying on top of him, although he was not aware of ever having gonorrhea himself and could not offer a definitive explanation for how Carolyn contracted the disease. The accused also admitted that on two prior occasions subsequent to his arrival on Okinawa in 1984, he engaged in oral sexual relations with Carolyn. He attributed all such sexual intimacies to his deteriorating marital relationship and to

seeking the love from Carolyn that he could not have from his wife.

The independent evidence corroborating the accused's confession confirmed he was TAD to the Philippines in mid-July 1985; he returned to his home in Okinawa shortly thereafter where his wife and Carolyn resided; the accused's wife took Carolyn to the Naval Hospital, Okinawa, on 9 August 1985, because of a discharge from Carolyn's vagina; Carolyn was diagnosed as having gonorrhea; medical examination revealed a labial tear on Carolyn's vulva; expert testimony concluded that 99 percent of gonorrhea cases are transmitted through penial to vaginal or rectal sexual relations or oral sexual relations and that penetration is not necessary to transmit the disease; semen and other bodily fluids are transmitters of the disease; it is possible for a person to be asymptomatic for gonorrhea yet pass it to someone else; gonococcus bacteria grows only on moist parts of the body, namely the rectum, vagina, urethra, pharynx and mouth; less than 4 percent of persons with the disease falsely test negative; the accused reported for medical treatment on 19 September 1985 complaining of a sore throat but was not specifically tested for gonorrhea because he did not acknowledge any sexual intimacy with an infected person; the accused was diagnosed as having pharyngitis and treated with penicillin; oral gonorrhea manifests itself within two hours to two weeks depending upon individual characteristics; the disease will persist until treated; persons contracting oral gonorrhea may demonstrate symptoms that could be diagnosed as a severe sore throat or pharyngitis; and proper medication normally will effect a cure within 24 hours.

The accused testified on the motion to suppress and repudiated his confession as a fabrication designed to take the blame for transmitting the disease to Carolyn in order to protect his wife from having Carolyn and her other daughter taken by government authorities. The accused denied engaging in any sexual intimacies with Carolyn or

with any persons in the Philippines, and further denied ever contracting gonorrhea. He related that upon his return from the Philippines to Okinawa he engaged in sexual relations with his wife and that both he and his wife tested negative for gonorrhea. The accused's wife confirmed she had conventional and oral sexual relations with the accused upon his return from the Philippines and that she tested negative for gonorrhea. She also denied (1) seeking assistance from family advocacy concerning matters growing out of marital problems with the accused, (2) reporting to authorities that her husband had been abusive in their marital relationship, (3) knowing that her husband had engaged in an extramarital affair, and (4) telling a family advocacy counselor that she was sent by God to save her husband. The Government presented rebuttal evidence contradicting such denials by the accused's wife. Further evidence bearing on the credibility of the accused and his wife was introduced to show (1) the accused's two natural sons were taken from his custody and out of the home in which his wife resided by virtue of one of them suffering a severe laceration on his forehead, which, according to the accused's wife, was sustained while the two boys were playing, (2) the accused's wife temporarily lost custody of her two natural daughters, and (3) the accused's wife and her two children are almost totally dependent upon the financial support provided by the accused.

We will begin our analysis of the assignment of error by examining the historical genesis of Military Rule of Evidence (Mil.R. Evid.) 304(g), Manual for Courts-Martial, United States, 1984.[1]. Paragraph 140*a*, Manual for Courts-

[1]Mil.R.Evid. 304(g) provides:

*Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated

Martial, United States, 1951 (MCM, 1951), after setting forth the general rule that "[a]n accused cannot legally be convicted upon his uncorroborated confession or admission," provided that the corroboration requirement is satisfied where there is evidence of record "that the offense charged had probably been committed by someone." The "corpus delicti" rule as stated in MCM, 1951, is widely adopted by federal circuit courts of appeal,[2] and requires independent proof outside the confession that the harm or injury occurred and that it had a criminal origin. *See Manning v. United States*, 215 F.2d 945 (10th Cir. 1954). In cases involving a tangible corpus delicti, "[t]here need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it." *Wong Sun v. United States*, 371 U.S. 471, 489 n. 15, 83 S.Ct. 407, 418 n. 15, 9 L.Ed.2d 441, 456 n. 15 (1963). However, a tangible corpus delicti may not in all cases be possible to prove without identifying the accused as the perpetrator. In such cases, a broader rule was adopted in

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confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

[2]*See United States v. Opdahl*, 610 F.2d 490 (8th Cir. 1979), *cert. denied*, 444 U.S. 1091, 100 S.Ct. 1056, 62 L.Ed.2d 780 (1980); *United States v. Johnson*, 191 U.S.App.D.C. 193, 196, 589 F.2d 716, 719 (D.C.Cir.1978); *United States v. Begay*, 441 F.2d 1136, 1137 (10th Cir. 1971); *Rodriquez v. United States*, 407 F.2d 832, 834 (9th Cir. 1969); *Hicks v. United States*, 127 U.S.App.D.C. 209, 215 n. 6, 382 F.2d 158, 163 n. 6 (D.C.Cir. 1967); *United States v. Braverman*, 376 F.2d 249, 253 (2d Cir. 1967); *Caster v. United States*, 319 F.2d 850, 852 (5th cir. 1963).

*Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), which held that

> the corroborative evidence need not be sufficient, independent of the statements to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. . . . It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.

*Opper*, 384 U.S. at 93, 75 S.Ct. at 164, 99 L.Ed. at 108–109. In *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954), the Supreme Court, elaborating on *Opper*, stated:

> The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the violence, the so-called corpus delicti. Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession. But in a crime such as tax evasion there is no tangible injury which can be isolated as a corpus delicti. As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater protection than the rule affords to a defendant in a homicide prosecution, . . . or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus delicti, where the corroborative evidence must

> implicate the accused in order to show that a crime has been committed.

*Smith*, 348 U.S. at 153–154, 75 S.Ct. at 197–198, 99 L.Ed. at 199. The *Smith* Court further held:

> In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, . . . and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged. . . . We answer both in the affirmative. All elements of the offense must be estalished by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused.

*Id.*, 348 U.S. at 156, 75 S.Ct. at 199, 99 L.Ed. at 200–201. Although a commentary in Department of the Army Pamphlet No. 27-2, "Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised edition" (Headquarters, Department of the Army, July 1970), at paragraph 27-10, suggests that the Supreme Court may have abandoned the corpus delicti rule in *Opper* and *Smith*, any question in this regard was resolved in *United States v. Calderon*, 348 U.S. 160, 75 S.Ct. 186, 99 L.Ed. 202 (1954), decided the same day as *Smith and Opper*, and *Wong Sun v. United States, supra*, both of which upheld the continuing validity of the corpus delicti rule. As such we conclude the Supreme Court has not abandoned the corpus delicti rule, but has provided a second approach where the corpus delicti could not be proven independently, and, in such cases, the trustworthiness of the confession can be supplied by independent evidence dovetailing with the admitted facts sufficiently to justify a jury in-

ference of their truth, thereby proving the offense through the statements of the accused.

Recognizing the inflexibility of the corpus delicti rule in cases in which a tangilble corpus delicti cannot be proven by independent evidence and the unwillingness of the Court of Military Appeals[3] to adopt the *Opper-Smith* rationale in such cases, the MCM, 1951 rule was revised in paragraph 140*a* (5), Manual for Courts-Martial, United States, 1969 (Revised Edition) (MCM, 1969), as follows:

> (5) *Corroboration of confessions and admissions.* It is a general rule that a confession or admission of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which corroborates the essential facts admitted sufficiently to justify an inference of their truth.

The MCM, 1969 rule, which tracks the *Opper-Smith* language, was substantially restated in Mil.R.Evid. 304(g), *supra.* We need not answer the question of whether Mil.R.Evid. 304(g) was intended to adopt the two-pronged federal approach of (1) preserving the corpus delicti rule and (2) providing for a more flexible rule in accordance with the *Opper-Smith* rational where a corpus delicit cannot be established by independent evidence, as the evi-

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[3]In *United States v. Mims,* 8 U.S.C.M.A. 316, 24 C.M.R. 126 (1957), the Court of Military Appeals determined that the accused's confession to heroin use was not sufficiently corroborated by needle marks on his arm, concluding that such marks were equally consistent with his innocence by virtue of having been required to submit to blood amples in the course of being treated for a disease. As such, the Court concluded that the needle marks added nothing to the probability that a crime had been committed (corpus delicti), and strictly applied the corpus delicti rule in the 1951 Manual to the exclusion of the *Opper-Smith* rationale in concluding the accused's confession was not sufficiently corroborated.

dence in the present case goes far beyond establishing a corpus delicti and, if believed, fortifies the truth of the confession utilizing only the *Opper-Smith* second prong. However, before identifying the evidence which leads us to this conclusion, we made the following observations, i.e., (1) if Mil.R.Evid. 304(g) is limited to the language of *Opper-Smith* without reference to the two-pronged federal approach, it has adopted the *Opper-Smith* rule out of context and, (2) we believe a persuasive argument can be made that Mil.R.Evid. 304(g) recognized that *Opper-Smith* was designed to give the federal sector more, not less, flexibility in establishing a two-pronged test, and that the revised military rule is broad enough and was designed to emulate the more flexible federal rule, subject to the caveat that under either prong the linchpin consideration is whether the *independent evidence corroborates the essential facts admitted sufficiently to justify an inference of their truth.* Mil.R.Evid. 304(g).

Turning to the evidence of record, we conclude there is independent evidence of a corpus delicti, i.e., that Carolyn unlawfully contracted gonorrhea from someone through sexual intimacy, together with other independent evidence dovetailing with the confession that would directly and circumstantially prove through the confession that the accused: (1) contracted gonorrhea, (2) transmitted the disease to Carolyn upon his return from the Philippines, (3) falsely tested negative for gonorrhea, (4) did not transmit the disease to his wife by virtue of their estrangement, notwithstanding the testimony of the accused and his wife to the contrary, (5) sought treatment for the disease although believing at the time he was suffering from a condition no more serious than a sore throat, and (6) denied having gonorrhea in the course of confessing to the offenses because at the time he believed that he was free of the disease by virtue of falsely testing negative. Although the independent evidence falls short of alone proving the identity of the accused as the perpetrator of the offenses, the

independent evidence bolsters the confession and proves through the confession that the accused commited the offenses. No more is required under the *Opper-Smith* rationale or under the most restrictive interpretation of the revised military rule.

Ultimately, the trier of fact must determine whether the accused's guilt on the whole of the evidence, including his confession, is established beyond a reasonable doubt. The question however, before the trial judge on the motion to suppress the accused's confession did not require conideration of the ultimate issue and the attendant burden of proof, but whether the independent evidence raised an "inference of the truth of the essential facts admitted," as prescribed in Mil.R.Evid. 304(g)(1). As in *Wong Sun, supra,* we intimate no view as to whether the independent evidence sufficiently corroborates the accused's confession. Such a determination is solely within the province of the trial judge, upon remand, and his decision will not be disturbed on appeal where he has not erred as a matter of law, *United States v. Scholz,* 19 M.J. 837 (NMCMR 1984), and his findings of fact are not wholly unsupported by the evidence, *United States v. St. Clair,* 19 M.J. 833 (NMCMR 1984). We hold only that the trial judge erred as a matter of law in requiring the Government to prove through independent evidence alone the identity of the accused as the perpetrator of the offenses, where the independent evidence, if believed, established the identity of the accused as the perpetrator of the offense through and by dovetailing with the confession, albeit such independent evidence did not itself prove the accused committed the offenses.

Accordingly, we conclude the trial judge erred as a matter of law in suppressing the accused's confession. As such, we reverse the ruling of the trial judge and return the record of trial to the Judge Advocate General of the Navy

for remand to the trial court for further proceedings not inconsistent with this opinion.

Chief Judge GORMLEY and Judge RAPP concur.